IN THE

Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 13. Original.

Ex parte: In the matter of JAMES S. BARTON KEY, *Petitioner.*

ANSWER OF THE RESPONDENTS.

For answer to the rule served upon them in the above entitled proceedings, to show cause why the writ of mandamus should not be awarded as prayed in the petition therein, these respondents say:

1–6. That they have no personal knowledge as to the matters and things alleged in paragraphs 1 to 6 of the petitioner's petition, other than that a certain duly certified transcript of record in the case of James S. Barton Key, appellant, *vs.* William F. Roberts, appellee, was filed in the Court of Appeals of the District of Columbia on May 14, 1902, and there docketed as cause No. 1220, and aver that for the purposes of these present proceedings only the said transcript of record is material or can be considered, and that said transcript of record shows that the said cause, then entitled William F. Roberts

vs. James S. Barton Key and James P. Scott, originated before Anson S. Taylor, one of the justices of the peace in and for the District of Columbia, who rendered judgment against both defendants for the amount claimed, from which judgment the defendants appealed to the Supreme Court of the District of Columbia, giving an undertaking on appeal with the United States Fidelity and Guaranty Company as surety; that in the said Supreme Court of the District of Columbia the cause was tried before a jury which, under the peremptory instruction of the court, rendered a verdict for the defendant Scott and in favor of the plaintiff against the defendant Key for the amount claimed, upon which verdict judgment was rendered in favor of the plaintiff against the defendant Key and the said surety, jointly, for the amount claimed, with costs, from which said judgment the defendant Key alone, without joining the said surety or procuring a summons and severance, attempted to prosecute an appeal to the Court of Appeals of the District of Columbia, and filed in the office of the clerk of said Court of Appeals the transcript of record aforesaid.

7–8. That thereupon the appellee Roberts filed in the said Court of Appeals a motion to dismiss the said attempted appeal upon two grounds:

> "First. That the appeal is defective in not joining the said United States Fidelity and Guaranty Company as appellant and no proceeding by way of summons and severance having been had.
>
> "Second. That this court has no jurisdiction on appeal from a judgment of the court below in such cases."

That in the matter of a certain other attempted appeal from a judgment of the Supreme Court of the District of Columbia in a certain other cause removed into said Supreme Court of the District of Columbia by appeal from a judgment of one of the then justices of the peace in and for the District of Columbia, and entitled in the said Court of Appeals as *Groff* vs. *Miller*, there was then pending a motion to dismiss upon the

single ground of lack of jurisdiction, and upon consideration thereof these respondents, sitting as the justices of said Court of Appeals, granted the said motion for the reasons stated in their opinion and decision filed in said cause.

And, as the said decision controlled the determination of the second ground of the said Roberts' motion to dismiss in said case of *Key* vs. *Roberts*, the respondents thereupon on June 24, 1902, granted the said motion and entered an order dismissing the appeal of the said Key, and thereafter denied a motion on behalf of said Key to vacate the said order and grant a rehearing.

9. They deny that, in refusing to take jurisdiction of the said appeal of the said Key, they have acted contrary to law or denied to the said Key a substantial right conferred upon him by law; but, on the contrary, aver that the said appeal was properly dismissed.

They deny that the rule of decision by them in said cases of *Groff* vs. *Miller* and *Key* vs. *Roberts* is of far-reaching effect and aver that, on the contrary, the said two cases were the only instances of appeal ever attempted to be taken to the said Court of Appeals from a judgment of the Supreme Court of the District of Columbia in a case pending therein on appeal from a judgment of a justice of the peace, while the Code of the District of Columbia as originally passed was in force; that the appellant in said case of *Groff* vs. *Miller* has acquiesced in said ruling; and that the question of the right of appeal in such cases, under the provisions of the said Code of the District of Columbia as originally passed, cannot arise in any other case, inasmuch as the amendment to the Code passed on June 30, 1902, has repealed Section 82 thereof, leaving Section 226 standing alone, and these respondents have since the said amendment sustained the right of appeal from judgments of the Supreme Court of the District of Columbia in all cases originating before justices of the peace.

And the respondents refer to the certified transcript of the

record in said case of *Key* vs. *Roberts* in the said Court of Appeals (including their opinions and decisions in said case of *Groff* vs. *Miller*), filed with the petition for mandamus herein, and pray that the said transcript of record, including said decisions in *Groff* vs. *Miller*, may be read and considered as part hereof.

In conclusion, these respondents respectfully submit that the present application does not present a case for the issuance of a writ of mandamus for the vacation of a judgment of dismissal of an appeal to an inferior Court of the United States, with direction to reinstate the appeal therein, for want of jurisdiction in the inferior Court, by the Supreme Court of the United States in the exercise of *its appellate jurisdiction*. If the appeal dismissed had been heard on its merits, no appeal to the Supreme Court of the United States would have lain, and therefore there is no ground for the exercise of appellate jurisdiction by the Supreme Court. Upon the principle of the present application, the Supreme Court would be required to exercise general supervisory power, by means of mandamus, over all the inferior Courts of the United States, from the Police Court of this District up to the Circuit Courts of Appeal, wholly irrespective of any ultimate right of appeal or writ of error to this Court, whenever it is alleged that there has been an order or judgment passed in those Courts for the supposed want of jurisdiction.

A mandamus has never been allowed the effect of a writ of error, but that would seem to be the effect of the mandamus if allowed in this case. Your respondents are well aware that by repeated decisions of this Court the rule has been established that this Court has power to issue a mandamus, *in the exercise of its appellate jurisdiction*, and that the writ will lie in a proper case to direct a subordinate Federal Court to decide a pending cause, or to reinstate a cause that has been improperly dismissed for want of jurisdiction. But this power is exercised, as we understand it, in order that this Court may

exercise the jurisdiction of review given by law; to secure to the party his ultimate right of appeal to, and review by, this Court. That was the principle upon which the mandamus was ordered in the case of *Ex parte Bradstreet*, 7 *Pet.*, 647, and which principle has been fully recognized in subsequent cases: *Ins. Co.* vs. *Comstock*, *16 Wall.*, *258*, *270*; *Ex parte Russell*, *15 Wall.*, *664*, *670*; *In re Atlantic City Railroad*, *164 U. S.*, *633*.

We respectfully submit that this application ought to be dismissed.

R. H. ALVEY,
Chief Justice.

M. F. MORRIS,
SETH SHEPARD,
Associate Justices.

Supreme Court of the United States

OCTOBER TERM, 1902.

No......, Original.

EX PARTE: IN THE MATTER OF JAMES S. BARTON KEY, PETITIONER.

Petition for Writ of Mandamus to Require the Court of Appeals of the District of Columbia to Take Jurisdiction of and to Hear and Determine an Appeal to It from a Judgment of the Supreme Court of the District of Columbia Rendered Against Petitioner Alone in the Case of William F. Roberts, Plaintiff, v. James S. Barton Key and James P. Scott, Copartners, Defendants.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, James S. Barton Key, respectfully shows as follows:

1. That on the 5th day of February, 1901, before A. S. Taylor, one of the justices of the peace for the District of Columbia, one William F. Roberts, as plaintiff, commenced an action at law against your petitioner and James P. Scott,

as copartners, to recover the sum of $196.30 alleged to be due to plaintiff from defendants as a partnership debt on account of certain printed matter and stationery furnished for the use of the hotel "Barton," in Washington, D. C. (R., 1).

2. Writ of summons running against J. S. Barton Key and James P. Scott, "copartners," was personally served on both defendants (R., 1, 2,) and the case came on for hearing before the justice of the peace in due course, and on the 3d day of April, A. D. 1901, judgment was rendered in favor of the plaintiff and against the defendants, as copartners, for the amount claimed, with interest and costs.

3. From such judgment the petitioner and his codefendant, said James P. Scott, duly appealed to the supreme court of the District of Columbia, and their appeal having been duly perfected the case was docketed in said supreme court as cause at law No. 44625.

4. On the 23d day of January, 1902, said case, pursuant to existing law, came on for trial *de novo* in the supreme court of the District of Columbia before Mr. Justice Anderson and a jury, and the plaintiff having introduced testimony to sustain the issues joined and having announced his evidence closed, the trial justice, on motion in such behalf made, instructed the jury "that from the undisputed facts in the case there is no partnership" between the defendants Key and Scott, and therefore "to return a verdict in favor of the defendant Scott on that ground" (R., 18).

5. Thereupon counsel for the defendant Key, petitioner here, moved the court to instruct the jury to return a verdict

in favor of said Key also, on the ground that the suit of the plaintiff having been laid against the defendants as copartners, and the court having declared that the proof had failed to establish any partnership relation between them, no legal judgment could be rendered in favor of the plaintiff and against the defendant Key alone in the pending proceedings; but such instruction was refused by the court (R., 17), and, no further testimony being offered by any party, the court instructed the jury as follows:

"In view of the conclusion reached by the court as to the legal effect of the testimony which has been submitted to you, the court instructs you in this case to return a verdict for the defendant Scott and against the defendant Key. The undisputed facts make it proper that that character of verdict should be rendered" (R., 17).

To which instruction counsel for petitioner duly objected and noted an exception on the minutes of the court, and the jury thereupon returned its verdict in favor of the plaintiff and against the defendant Key for the total amount claimed in the declaration (R., 17), and judgment was, on the 28th day of February, 1902, entered pursuant thereto (R., 5).

6. From such judgment your petitioner, Key, on March 7, 1902, in accordance with the law and existing rules of practice, prayed an appeal to the Court of Appeals of the District of Columbia (R., 5) and perfected the same by making a deposit to cover costs in lieu of filing a bond for costs (R., 6), and thereafter duly served citation on the appellee, Roberts, and perfected his appeal by lodging a duly certified transcript of the record in the cause in the clerk's office of the Court of Appeals of the District of Columbia, and the

same was therein duly docketed as cause No. 1220 on the general docket of that court.

7. Subsequently, on motion of said appellee Roberts and against the opposition of your petitioner, said Court of Appeals, on the 24th day of June, 1902, dismissed said appeal and refused to hear the same on the ground that it had no jurisdiction to do so, notwithstanding the fact that there was then in full force in said District of Columbia the following provision of law governing and regulating the jurisdiction of the Court of Appeals of the District of Columbia.

Subchapter IV, THE COURT OF APPEALS:

SECTION 226. *Jurisdiction.*—Any party aggrieved by any final order, judgment, or decree of the supreme court of the District of Columbia, or of any justice thereof, "including any final order or judgment in any case heard on appeal from a justice of the peace," may appeal therefrom to the said Court of Appeals; and upon such appeal the Court of Appeals shall review such order, judgment or decree, and affirm, reverse, or modify the same as shall be just," * * *

8. Said Court of Appeals refused to take jurisdiction to hear and determine said appeal for the reason, as stated in its opinion granting the motion to dismiss (R., 26), that there was "difficulty in reconciling and making consistent section 82 (subchapter III) with the provision contained in section 226 (*supra*), if we adhere strictly to the literal terms employed in the latter section."

Section 82 (Subchapter III, SUPREME COURT OF THE DISTRICT OF COLUMBIA) reads as follows:

"In no case appealed from a justice of the peace shall there be any further appeal from the judgment of the circuit court."

said Court of Appeals further stating (R., 28) in its said opinion that—

"It is difficult to suppose that it was ever the intention of Congress, by the adoption of section 226 of the Code, to give the right of appeal to this court in all cases of appeal from justices of the peace to the supreme court of this District, even though the amount in controversy barely exceeded five dollars. Yet the words employed in the section, if taken literally, would seem to confer the right. Where the demand in controversy exceeds fifty and does not exceed three hundred dollars, the suit therefor may be brought either before a justice of the peace or in the supreme court of the District, and if brought before a justice of the peace, the defendant may remove the case to the supreme court of the District by *certiorari* for trial in the first instance. * * * If the words in section 226, instead of being read as applying to appeals strictly as such from justices of the peace, be read as applying to final orders or judgments in any case heard on return of *certiorari* by or from a justice of the peace, the apparently conflicting provisions of sections 82 and 226 would be made to harmonize and be rendered consistent, the one with the other, and would consist throughout with the general scheme of the statute relating to civil actions brought before justices of the peace, and this, we think, is the fair and rational construction to be placed upon the terms employed in section 226." * * *

9. Within one week after the rendition of such opinion, viz., on June 30, 1902, the Congress repealed section 82 (*supra*) and amended section 226 by striking out thereof the quotation-marks, leaving the words as above quoted; and thereafter petition for a rehearing in the above cause was filed on the ground that the Congress by such amendments had put a legislative construction upon the so-called conflicting provisions of said sections 82 and 226 of the Code;

but such petition was denied (R., 24, 29), the court saying in its opinion (R., 29):

"The Code was adopted as an entirety and as a single legislative act, and no one part or section of it could in reason be said to be the last expression of legislative will. If in the amendatory and repealing act, passed after the appeal was disposed of by this court, congressional construction is to be accepted as to the meaning originally intended by section 226, then the fact that it was deemed necessary to repeal section 82, in order to give force and effect to section 226, it would follow that while both sections remained unrepealed they neutralized and frustrated each other, and neither could be allowed effective operation. This would leave the law as it existed prior to the adoption of the Code in full force, that is to say, without any effective statutory right of appeal to this court, in cases like the present, and that being the case, the appeal taken in this case could not be sustained. In any aspect, therefore, this appeal would have to be dismissed."

9. Petitioner is advised by counsel, and therefore avers, that the Court of Appeals of the District of Columbia, in refusing to take jurisdiction of the appeal in the above-entitled cause, has acted contrary to law, and has denied to your petitioner a substantial right which was conferred upon him and all persons litigants in like or similar position to him; that the course of reasoning adopted and announced by the said court in its opinions above referred to is unsound and violative of settled canons of statutory construction heretofore adopted and declared by this court, and that the rule of decision so announced by said Court of Appeals is of far-reaching effect, and unless reviewed and revised by this court will effectually bar litigants in cases originally brought in justices of the peace courts, and appealed thence to the supreme court of the District of Columbia, from eventually appealing from the judgment of said supreme court

to the Court of Appeals, notwithstanding the plain words of section 226 of the Code expressly conferring such right of appeal in all such cases.

Wherefore your petitioner prays that a writ of mandamus may be issued out of and under the seal of this honorable court, directed to the Court of Appeals of the District of Columbia, and to the Honorable Richard H. Alvey, Chief Justice of the Court of Appeals of the District of Columbia, and the Honorable Martin F. Morris and Seth Shepard, associate justices of said court, commanding and requiring them and each of them—

I. To reinstate the appeal of petitioner in said cause;

II. To proceed to a hearing and determination of the same on its merits;

III. And for such other and further relief in the premises as to this court may seem appropriate and law and justice may require.

J. S. BARTON KEY.

DISTRICT OF COLUMBIA, *ss:*

I, Frederic D. McKenney, being first sworn, do depose and say that I am one of the attorneys for the petitioner, J. S. Barton Key; that I have read the foregoing petition and know the contents thereof, and that the statements of fact therein contained are true to the best of my knowledge, information, and belief.

FREDERIC D. MCKENNEY.

Subscribed and sworn to before me this 6th day of March, A. D. 1903.

[L. S.]

MARTIN S. DECKER,
Notary Public, D. C.

BRIEF IN SUPPORT OF THE APPLICATION FOR A WRIT OF MANDAMUS.

I. MANDAMUS IS THE PROPER REMEDY WHERE A RIGHT OF APPEAL ALLOWED BY LAW IS DENIED.

Where the court below, from a mistaken view of the law as to its jurisdiction, dismisses a case properly cognizable by it, mandamus is the proper remedy to compel it to reinstate the case and proceed to final judgment. A writ of error or appeal does not lie, for the appellate court has nothing to review where the inferior court has not decided the case, but has refused to hear it.

Ex parte Russell, 13 Wall., 664, at p. 670.
Insurance Co. *v.* Comstock, 16 Wall., 258.
Ex parte Parker, 120 U. S., 737, at p. 743.
Ex parte Parker, 131 U. S., 221, at p. 226.
Re Atlantic City R. R., 164 U. S., 635.
Re Hohorst, 150 U. S., 653.
Ex parte Connaway, 178 U. S., 421.

Mandamus lies to compel a court to grant an appeal where the relator is entitled thereto.

Ex parte Jordan, 94 U. S., 248.
Ex parte Zeliner, 9 Wall., 244.
Vigo's case, 21 Wall., 648.
U. S. *v.* Gomez, 3 Wall., 752.
Ex parte South, &c., Alabama R. Co., 95 U. S., 221.

In the case of *Ex parte* Zellner, the Court of Claims, in construing an act of Congress of March 3, 1863, determined that there was no right of appeal from its decision to the Supreme Court of the United States. On an application for writ of mandamus, however, the Supreme Court of the United States determined that there was a right of appeal, under the statute, from the decision of the Court of Claims. A peremptory mandamus was accordingly ordered to be issued.

Vigo's case was to the same effect, a peremptory mandamus having been there issued to compel the Court of Claims to grant the appeal which, under the law as construed by the Supreme Court of the United States, he was entitled to.

II. THE COURT OF APPEALS HAS DENIED PETITIONER A RIGHT OF APPEAL ALLOWED BY LAW.

The act of Congress of March 3, 1901, establishing a code of law for the District of Columbia, contained two irreconcilable provisions touching appeals to the Court of Appeals from judgments of the supreme court of the District of Columbia in cases heard on appeal from justices of the peace.

The two conflicting provisions may, for the sake of clearness, be placed in juxtaposition as follows:

CHAPTER I.

SUBCHAPTER III.

Supreme Court of the District of Columbia.

SEC. 82. In no case appealed from a justice of the peace shall there be any further appeal from the judgment of the circuit court.

SUBCHAPTER IV.

The Court of Appeals.

SEC. 226. *Jurisdiction.*—Any party aggrieved by any final order, judgment, or decree of the Supreme Court of the District of Columbia, or any justice thereof, "including any final order or judgment in any case heard on appeal from a justice of the peace," may appeal therefrom to the said Court of Appeals; and upon such appeal the Court of Appeals shall review such order, judgment, or decree, and affirm, reverse, or modify the same as shall be just, except as provided in the following sections.

We thus have one section of the Code (an earlier one) expressly providing against and another section of the Code (a later one) expressly providing for appeals to the Court of Appeals from the final orders and judgments of the supreme court of the District of Columbia in cases heard on *appeal* from the justices of the peace.

No subsequent section takes away the right of appeal thus expressly and emphatically conferred by section 226, nor does any subsequent section put it on a different footing from appeals from judgments entered in causes commenced originally in the supreme court of the District of Columbia. No stronger language could be employed to indicate the intent of the law-maker. As if to emphasize this intent, the clause relating to appeals in causes begun in a justice's court is included within quotation-marks. In fact, this identical phrase—"INCLUDING ANY FINAL ORDER OR JUDGMENT IN ANY CASE HEARD ON APPEAL FROM A JUSTICE OF THE

PEACE"—was, on March 2, 1901, the day before the final passage of the act, recommended by the Senate Committee on the District of Columbia and adopted by the Senate as in Committee of the Whole as a specific amendment to said section 226 as theretofore drafted (Congressional Record, 1901, p. 3495).

That it was, therefore, the intention of Congress to give an aggrieved party an appeal to the Court of Appeals from a judgment of the supreme court of the District of Columbia in any case heard on *appeal* from a justice of the peace seems quite clear, and the intention thus to be gathered must be the controlling medium by which to construe the act.

"The primary rule of statutory construction is of course to give effect to the intention of the legislature."

Rodgers *v.* U. S., 185 U. S., 83.

The failure of Congress to expressly (rather than by implication) cancel the earlier conflicting section of the Code was manifestly an oversight.

But, aside from the real intention of Congress (which, of course, must receive the greatest weight in the interpretation of a statute) thus evidenced, the jurisdiction of the Court of Appeals under section 226 would seem to be established by the well-settled rule of statutory construction that where provisions of one section are irreconcilable with the provisions of another section, "the last words stand, and others which cannot stand with them go to the ground."

Powers *v.* Barney, 5 Blatchf., 203.

State *v.* Hall, 5 Rich., 120.

Elliott *v.* Lochrane, 1 Kan., 135.

Ryan *v.* State, 5 Neb., 276, 282.

Gibbons *v.* Brittenum, 56 Miss., 232.
Packer *v.* Railroad Co., 19 Pa. St., 211.
Brown *v.* County Commissioners, 21 Pa. St., 37, 42.
Southwark Bank *v.* The Commonwealth, 26 Pa., 380, 382.
Bacon's Abr., tit. Statutes D.
Ex parte Ray & Defoe, 45 Ala., 15.
Harrington *v.* Rochester, 10 Wend., 547, 553.
Commercial Bank *v.* Chambers, 8 Sm. & M., 9.
Quick *v.* Whitewater Township, 77 Ind., 570.
Albertson *v.* State, 9 Neb., 429.
Sams *v.* King, 18 Fla., 557.
Branagan *v.* Dulaney, 8 Colo., 408.
Gee *v.* Thompson, 10 La. Ann., 657.
Peet *v.* Nalle, 30 *id.*, Pt. II, 949.
Hamilton *v.* Buxton, 6 Ark., 24.

In the case of Powers *v.* Barney there was a direct conflict between two sections of an act of Congress of March 2, 1861. The 19th section imposed 10 per cent. ad valorum duty on Peruvian bark. Tne 22d section said that no duty should be charged on Peruvian bark. Judge Nelson said:

"Each party finds an authority for his claim in the same act of Congress. In this difficulty of conflicting claims, I know of no other way of solving it, than by applying the well-settled rule of construction, in the case of two repugnant provisions of the same act, which is, that the last provision shall prevail, as speaking the latest and final intent of the law-makers."

"If the latter part of a statute be repugnant to the former part thereof, it shall stand; and so far as it is repugnant be a repeal of the former part, because it was last agreed to by the makers of the statute."

Bacon's Abr., tit. Statutes D.

"In cases of irreconcilable repugnancy, it is the last part of a statute which is taken to express the intention of the law-maker."

Packer *v.* Railroad Co., 19 Pa. St., 211.

"All the several sections, on the same subject, should be construed together. By being embraced in the Code, they formed into a system on the subject to which they refer, and by the adoption of the Code the legislature has, as it were, laid its hands on them and given them new life and vitality, as a body. For this reason, if for no other, they should be interpreted and construed together, and, if possible, made consistent and in harmony with each other. If, however, this, in any particular case, cannot be done, then the earlier sections, or sections from earlier acts, must be held to be repealed, or so modified as to be in agreement with the later sections."

Ex parte Ray & Defoe, 45 Ala., 15.

"When two statutes are so flatly repugnant that both cannot be executed, and we are obliged to choose between them, the later is always deemed a repeal of the earlier. This rule applies with equal force to a case of absolute and irreconcilable conflict between different sections or parts of the same statute. The last words stand, and others which cannot stand with them go to the ground."

Brown *v.* County Commissioners, 21 Pa. St., 42.

True, there are a few isolated cases which have questioned the soundness of this settled rule; but, aside from the overwhelming current of authority supporting the rule, its foundation in reason and principle would seem to suffice to vindicate its origin and to defend the validity of its continued existence. In the reading of a bill, matter near the close may be presumed to have received the last consideration of the legislature, and, if assented to, constitutes the latest expression of the legislative will.

This honorable court has in a number of cases recognized that, in the absence of an express repeal, the later expression

of the legislative will operates as a repeal of the earlier expression, either where the two expressions are directly repugnant or where the later expression covers the whole subject of the earlier one and embraces new provisions which plainly show that it was intended as a substitute therefor.

U. S. *v.* Tynen, 11 Wall., 88, at p. 92.
Davis *v.* Fairbairn, 3 How., 636.
Norris *v.* Crocker, 13 How., 429.
King *v.* Cornell, 106 U. S., 395, at p. 396.

The plain intent of Congress, as gathered from the history of the matter, and the canons of construction unite in supporting the contention that section 226 of the Code confers upon aggrieved parties the right of appeal to the Court of Appeals from the final orders and judgments of the supreme court of the District in cases heard on appeal from justices of the peace.

The Court of Appeals, however, instead of giving effect to the intent of Congress, has attempted to nullify the same. It declares that while the word "*appealed*," used in section 82, is to be given its usual signification, yet the word "*appeal*," used in section 226, is to be construed otherwise; in other words, that Congress did mean what it said when it denied the right of appeal in section 82, but when in express and direct terms, emphasizing the same by quotation-marks, it granted the right of appeal in section 226, it did not mean what it said.

The ruling of the Court of Appeals that the words "*on appeal*" as used in section 226 are synonymous with "*on certiorari*" is, it is respectfully submitted, wholly unwarranted by anything contained in the Code, and is unsup-

ported by reason or authority. In fact, to construe the clause "INCLUDING ANY FINAL ORDER OR JUDGMENT IN ANY CASE HEARD ON APPEAL FROM A JUSTICE OF THE PEACE," in section 226, as having been intended by Congress to refer to cases brought up to the supreme court of the District of Columbia *by certiorari* in the first instance, without any trial whatever in the justice's court, would be to declare that the clause is superfluous and without meaning or force of its own, for it has never been doubted that an appeal would lie from the judgment of the supreme court in all cases removed into that court by certiorari on the ground of concurrent jurisdiction.

Aside from the clause reading "including any final order or judgment in any case heard on appeal from a justice of the peace" (and prior to the insertion thereof by amendment on the day previous to the passage of the act) section 226 clearly and explicitly gave any aggrieved party a right of appeal to the Court of Appeals from a final order or judgment in any case heard *on certiorari* from a justice of the peace. Omitting said clause from the section, the section would read:

"Any party aggrieved by any final order, judgment, or decree of the supreme court of the District of Columbia, or any justice thereof, may appeal therefrom to the said Court of Appeals; * * * "

It is to be noted that this right of appeal is given from "any final order, judgment, or decree of the supreme court" without restriction or limitation, and the Court of Appeals says in its decision that section 82 reading:

"In no case appealed from a justice of the peace shall there be any further appeal from the judgment of the circuit court."

applies to and affects only cases *appealed* from a justice of the peace, and has no relation whatever to cases removed by *certiorari* from a justice of the peace.

As, therefore, section 226 of the Code, prior to the insertion therein of the words "including any final order or judgment in any case heard on appeal from a justice of the peace," had already conferred the right of appeal in cases removed from the justice's court by certiorari, it is difficult to understand why it was necessary to insert such words, if not to confer the right of appeal in cases heard on appeal from a justice of the peace.

The intention of Congress in this regard is furthermore clearly indicated in recent amendments to the Code (approved June 30, 1902), whereby the repugnant section 82 is expressly repealed and section 226 is retained in full force, the quotation-marks around the clause "including any final order or judgment in any case heard on appeal from a justice of the peace" being also removed, because no longer necessary, in view of the cancellation of section 82. This may well be considered a legislative interpretation and an express declaration by Congress that it was intended that aggrieved parties to causes originating before justices of the peace and tried there in the first instance should have the ultimate right of appeal to the Court of Appeals. It would seem to be anomalous to hold that if a litigant removed his cause into the supreme court of the District of Columbia by certiorari he might thereafter appeal to the Court of Appeals from an adverse judgment of the former tribunal, but could not do so if he came into the supreme court by a technical appeal.

It appears clearly, however, that Congress intended to give to aggrieved parties the same substantial rights in the matter of appeals to the Court of Appeals, however they may have come into the supreme court of the District.

III. THE JUDGMENT OF THE SUPREME COURT OF THE DISTRICT OF COLUMBIA WAS ERRONEOUS AND SHOULD BE REVERSED.

In a suit upon a joint contract against three, the plaintiff is not entitled to recover against either of those parties without proving a joint contract as laid, although he does prove a contract, upon which the party against whom he seeks to recover is liable.

Shirreff *v.* Wilks, 1 East., 48.

It is now perfectly well established that a misjoinder of plaintiffs is a ground of nonsuit, as is also a joinder of too many defendants.

2 Stark. Ev., 83.

3 Stark. Ev., 1064.

Tuttle *v.* Cooper, 10 Pickering, 281.

Weall *v.* King, 12 East., 452, was a case for deceit against two, for fraudulent representation and warranty upon the sale of tombs. The proof at the trial was sufficient to establish the charge against one, but not against the other, and the plaintiff was nonsuited, subject to the opinion of the Court of King's Bench.

In giving the opinion of the court, Ellenborough said:

"The joint contract was the foundation of the joint warranty, and essential to its legal existence and validity,"

* * * "the proof of the contract must correspond with the description of it in all material respects." * * * "In this case a joint contract was necessary to be laid, in order to maintain the ground of action as stated upon the record, and being so laid, and not being proved, the plaintiff was properly nonsuited."

Shaw, Ch. J., in Tuttle *v.* Cooper (*supra*), says (p. 287):

"We cannot perceive that it makes any difference in the application of the rule under discussion, or whether one or more be defaulted and a verdict rendered in favor of others, a verdict and a default being equally a proper ground for a judgment, where, upon the whole record, the plaintiff is entitled to it." * * *

"Upon a review of all the cases, we think there is no one which throws any doubt upon the rule of practice, that in an action upon contract against two or more, the contract must be proved as laid, and that in a trial upon the general merits, the plaintiff cannot have a judgment against one or more, where all are not liable."

To like effect are 28 Illinois, 61, and 3 Day (Conn.), 303.

IV. THE PRAYER OF THE PETITIONER SHOULD BE GRANTED.

It is respectfully submitted and urged that a writ of mandamus should issue out of and under the seal of this honorable court, directed to the Court of Appeals of the District of Columbia and each of the justices thereof, commanding and requiring a reinstatement of petitioner's appeal and a hearing and determination of the same on its merits, as required by law.

HENRY P. BLAIR,
FREDERIC D. MCKENNEY,
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Attorneys for Petitioner, James S. Barton Key.

ther there be a verdict for one defendant
against another

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